No. 76-1143

In the
Supreme Court of the United States
OCTOBER TERM, 1977

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants,

vs.

BARLOW'S, INCORPORATED,
Appellee.

BRIEF FOR THE ROGER BALDWIN FOUNDATION INC. OF THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AS AMICUS CURIAE

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MAY IT PLEASE THE COURT:

The Roger Baldwin Foundation of ACLU, Inc. respectfully submits this brief *amicus curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS

The Roger Baldwin Foundation of the ACLU, Inc. (RBF) is an Illinois, non-partisan, not-for-profit corporation affiliated with the American Civil Liberties Union, Illinois Division, an organization consisting of approximately 7,000 members throughout Illinois, and committed solely to defending the liberties guaranteed by the Bill of Rights.* One of the most important of those liberties is the right to be free of unreasonable searches. The central issue in this case is whether that right is infringed by the Occupational Safety and Health Act (OSHA). RBF is presently involved as counsel in other litigation in the lower courts in which it is contending that warrantless administrative searches of residential and commercial premises by employees of the Department of Justice violates the Fourth and Fourteen Amendments. The ruling in the present case could affect the outcome of that litigation. Moreover, while the governmental interest sought to be advanced here—safety in the work place—is important, we believe that important governmental interests cannot, and need not, be achieved through unconstitutional means. Instead, the Court should once again resist "the pressure of official expedience against the guarantee of the Fourth Amendment." *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 274 (1973).

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* Amicus wishes to make clear that this brief states solely the position of The Roger Baldwin Foundation of ACLU, Inc. The American Civil Liberties Union national Board of Directors has decided to take no position before this court in this case.

STATEMENT OF THE CASE

Amicus accepts the statement of facts and proceedings below contained on Pages 9-11 of Appellants' Brief. Briefly, Appellee objected on Fourth Amendment grounds to a random, warrantless inspection of the non-public work areas of its commercial premises, conducted pursuant to the Occupational Safety and Health Act, 29 U.S.C. 567(a) (OSHA). A three-judge court ruled that OSHA authorizes such inspections, and ruled that OSHA is, therefore, unconstitutional under *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967). *Barlow's, Inc.* v. *Usery,* 424 F.Supp. 437 (D. Idaho 1976). The provisions of 29 U.S.C. §657(a) state as follows:

> a) In order to carry out the purposes of this chapter, the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

SUMMARY OF ARGUMENT

POINT 1. OSHA can and should be construed to require a warrant for random inspections of commercial premises.

POINT II. If OSHA authorizes warrantless inspections in the circumstances of this case, it is unconstitutional under the fourth amendment.

The history of the Fourth Amendment shows that it was intended to prevent unreasonable searches of commercial premises. This case is controlled by *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and *See* v. *City of Seattle,* 387 U.S. 541 (1967), rather than by *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970), and *United States* v. *Biswell,* 406 U.S. 311 (1972), because OSHA does not apply solely to industries long subject to close regulation and governmental licensing.

Requiring a warrant for random, unconsented inspections would not unduly impair enforcement of OSHA's provisions. First, the element of surprise, if necessary, can be satisfied by issuance of warrants which are *ex parte* as a routine matter. Second, administrative costs in procuring warrants are insufficient to overcome the Fourth Amendment guarantee against unconstitutional searches and seizures because a warrant requirement protects against the exercise of otherwise unreviewable discretion by officials in the field.

POINT III. The court need not and should not decide the appropriate standard for issuance of a warrant under OSHA.

The court could construe OSHA to require a warrant, as suggested by *Amicus,* or could hold OSHA unconstitutional because it cannot be construed to require a warrant. In either event, it would be appropriate to defer judgment on the appropriate standard for issuance of a warrant until there are appropriate proceedings in the lower courts in which that question is considered.

ARGUMENT

This case involves an attempt to conduct a routine and random inspection of the non-public areas of a small corporation engaged in the installation of electrical and plumbing fixtures, heating, and air-conditioning units. It is "undisputed" that the inspector "did not have any cause, probable or otherwise, to believe a violation existed nor was he in possession of any complaint by any employee. . ." *Barlow's Inc.* v. *Usery, supra,* at 439.*

Appellee's business is not licensed or closely regulated by the federal government and never has been. It is not an inherently or unusually dangerous business. There was no claim or showing below that Appellee's business in particular, or that type of business in general, is likely, or more likely than other businesses, to be in violation of OSHA's provisions. It is conceded that the attempted inspection was not based on any "history of past violations." (Appellants' Brief, p. 9, n. 7)

There was no claim or showing below that there were or might be dangerous conditions on the premises, or that prompt inspection was for any other reason essential. To the contrary, after entry was refused, Appellants waited over a month before applying for a court order to compel inspection. 424 F.Supp. at 438-439.

Finally, there was no consent to the attempted search, either by management or by the employees whose work

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* The constitutionality of a warrantless search that is triggered by a complaint from an employee is, therefore, not at issue in this case.

areas were to be inspected. The president of the company denied entry for the stated reason that the inspector did not have a search warrant.

In these circumstances, this court's decisions compel the conclusion that a warrantless inspection of Appellee's premises violates a fair construction of the Act to require a search warrant or if no such construction were possible, the warrantless inspection would violate the Fourth Amendment.

I. OSHA CAN AND SHOULD BE CONSTRUED TO REQUIRE A WARRANT.

In *Crowell* v. *Benson,* 285 U.S. 60, 62 (1932), the Court ruled that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

In *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (1973), the court acknowledged a "duty" under "familiar principles of constitutional adjudication" to "construe the statute, if possible, in a manner consistent with the Fourth Amendment." 413 U.S. at 272. See to the same effect, *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (1936) (Brandeis, *J.*, concurring in part and dissenting in part).

OSHA can fairly be construed to require either consent or a warrant, and several lower courts have expressly so ruled: *Brennan* v. *Gibson's Products, Inc.,* 407 F.Supp. 154, 162-163 (E.D. Texas 1976) (appeal pending, 5th Cir. No. 76-1526); *Usery* v. *Centrif-Air Machine Co., Inc.,* 424 F.Supp. 959 (N.D. Ga. 1977) (appeal pending, 5th Cir.

No. 77-1511); *Dunlop* v. *Hertzler Enterprises, Inc.,* 418 F.Supp. 627 (D. N. Mex. 1976) (appeal pending, 10th Cir. No. 76-2020); and *Usery* v. *Rupp Forge Co.,* ..... F.Supp. ..... (N.D. Ohio, No. 76-C-385, April 22, 1976) (appeal pending, 6th Cir., No. 76-1960).

As the court in *Brennan* v. *Gibson's Products,* noted, OSHA does not expressly authorize warrantless searches, and the legislative history on that point, though sparse and ambiguous, is not inconsistent with a warrant requirement. 407 F.Supp. at 162-3. To the contrary, as Appellants have candidly acknowledged, "Representative Steiger, the author of the version of Section 8(a) [the 'without delay' section] of the Act which ultimately prevailed in conference, stated that while prompt unannounced inspections are essential to the Act's enforcement, they were meant to be carried out 'in accordance with applicable constitutional protections.' Leg. Hist. 1077." (Appellants' Brief pp. 51-52) The "constitutional protections" that were "applicable" in 1970, when OSHA was enacted, were specified in the court's decision in *Camara* (1967) and in *See* (1967), both of which required warrants for administrative inspections.

If Congress *had* provided a penalty for refusal to permit warrantless OSHA inspections, that would have suggested that Congress did not believe employers have a constitutional right to refuse warrantless inspections under OSHA. But as Appellants acknowledge, Congress did *not* authorize any penalty for simple refusal to permit a warrantless OSHA inspection. (Appellants' Brief, pp. 8, 14 and 34) The absence of a penalty thus suggests that Congress did not intend to authorize warrantless OSHA inspections when the employer objects on constitutional grounds.

Moreover, the failure of Congress to impose a penalty for refusal of warrantless inspections suggests that Congress recognized that there was a right to require warrants. It can hardly be presumed that Congress would attempt to penalize the exercise of a constitutional right. Thus, in other circumstances, when Congress believed warrantless inspections *would* be constitutional, it penalized refusal to permit such inspections. For example, under the statute applicable in the *Colonnade* case, 26 U.S.C. §7342, Congress expressly authorized a $500 penalty for refusal to permit a warrantless inspection pursuant to the statute. 397 U.S. at 74. This court agreed with Congress that warrantless inspections, in the circumstances of that case, would not be unconstitutional.

In short, construing OSHA to require a warrant would be more consistent with Congressional intent than enjoining OSHA inspections entirely, and would cause much less disruption of on-going OSHA inspection efforts.

II. IF OSHA AUTHORIZES WARRANTLESS INSPECTIONS IN THE CIRCUMSTANCES OF THIS CASE, IT IS UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT.

A. The History of the Fourth Amendment Shows that It was Intended to Prevent Unreasonable Searches of Commercial Property and Commercial Premises.

As the court has recently noted, *United States* v. *Chadwick*, ... U.S. ....., 53 L.Ed.2d 538, 546 (June 21, 1977), "[I]t cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [which] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods."

James Otis, in his often-cited speech against the writs of assistance, called them "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book." 1 The Bill of Rights: A Documentary History 189 (B. Schwartz, ed., 1971) (hereinafter, "Schwartz"), quoting from *Legal Papers of John Adams,* 134-144 (Z. L. Wroth and H. Zibot, eds., 1965). Private homes were not the only places intended to be protected from arbitrary and unreasonable searches. For example, Otis attacked the writs of assistance because they authorized a person "in the daytime [to] enter all houses, *shops,* . . ." Schwartz, *supra,* at 190 (emphasis added).

John Adams also noted and criticized the commercial reach of the writs of assistance, describing the writs as authority for government officials "to attend and aid them in breaking open houses, stores, shops, cellars, ships, bales, trunks, chests, casks, packages of all sorts, to search for goods, wares, and merchandise, which had been imported against the prohibitions or without paying the taxes imposed by certain acts of Parliament . . ." Letter of Adams to William Tudor, March 29, 1817, 10 244-249 (C.F. Adams, ed., 1856). In short, a chief complaint of the colonists was that writs of assistance authorized arbitrary and unreasonable searches of commercial property and commercial premises.

The article in the Bill of Rights that was to become the Fourth Amendment can be traced to a proposal at the Virginia state ratifying convention in 1788 that a Bill of Rights should be taken up by the First Congress under the new Constitution, including the following article: "That every free man has a right to be secure from all unrea-

sonable searches and seizures of his person, his papers, and *property*; all warrants, therefore, to search *suspected places* . . . without information on oath . . . of legal and sufficient cause, are grievous and oppressive . . ." 2 Schwartz, *supra*, at 841-842 (emphasis added).

Thus, the history of the Fourth Amendment shows that the amendment was intended to prevent unconsented, warrantless searches of commercial premises. Cf. *Chadwick* v. *United States, supra,* 53 L.Ed. 546-547.

B. The Mere Fact of Doing Business Affecting Interstate Commerce Does Not Constitute a Waiver of Rights Under the Fourth Amendment and Consent to Warrantless Inspections Under OSHA.

This case is controlled by the court's holding in *Camara,* reaffirmed in *G. M. Leasing Corp.* v. *United States,* 429 U.S. 338 (1977), 50 L.Ed. 2d 530, 547 (1977), that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." In *Camara,* the court specifically overruled *Frank* v. *Maryland,* 359 U.S. 360 (1959), and rejected the contention made by the state government in that case that one of the classes of cases that should be excepted from the warrant requirement is "administrative inspection programs" such as the municipal health, safety and fire code inspections involved in *Camara* and *Frank.*

In *See,* the companion case to *Camara,* the court held that the protections of the Fourth Amendment outlined in *Camara* were applicable to commercial premises. Rejecting an argument similar to the government's argument in this case that its regulation of the nation's work places under OSHA automatically opens those work places

to warrantless inspections, the court observed in *See* that "[t]he businessman, too, has that right [to be free from unreasonable official entries into his commercial premises] placed in jeopardy if the decision to enter and inspect for violation of *regulatory* laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543 (emphasis added). The court concluded that administrative inspection of commercial premises "not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. at 545.

In the next two cases to consider administrative inspections, *Colonnade* and *Biswell,* the court "approved warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the government." *Almeida-Sanchez* v. *United States,* 413 U.S. at 270-271.

Appellants and amicus AFL-CIO argue that this case is like *United States* v. *Biswell* and *Colonnade* and unlike *Camara, See,* and *G. M. Leasing Corp.* v. *United States,* 429 U.S. 338 (1977). That argument is not persuasive.

In *G. M. Leasing* the court carefully distinguished *Colonnade* and *Biswell* from *Camara* by pointing out that *Colonnade* and *Biswell* involved businesses engaged in "a highly regulated activity." 50 L.Ed. 2d at 547. (*Biswell* involved firearms regulation; *Colonnade* involved liquor regulation.) Moreover, *G. M. Leasing* and *Almeida-Sanchez* reaffirm the fact that the Fourth Amendment was deemed to be of limited applicability in *Colonnade* and *Biswell* only because of the intensely regulated nature of the particular businesses there involved, not because any business regulated in any way by the government would involuntarily waive its Fourth Amendment rights by virtue of the exis-

tence of the regulation. Thus, OSHA, which applies to all employers within the full reach of Congress' commerce powers, is not the type of "licensing and regulation" scheme which the court addressed in *Colonnade* and *Biswell.*

Appellants' argument, if accepted, would authorize the warrantless search of virtually any "corner" store and would effectively repeal the Fourth Amendment with respect to all commercial enterprises.

C. Requiring a Warrant for OSHA Inspections Would Not Impose Unacceptable Burdens Upon OSHA's Enforcement.

The contention that a warrant requirement would impose unacceptable burdens on OSHA enforcement efforts assumes, first, that a warrant requirement would eliminate the element of surprise and thereby facilitate concealment of violations; and, second, that a warrant requirement would be prohibitively burdensome, thus justifying a departure from Fourth Amendment safeguards. Both of those assumptions are incorrect.

1. *A warrant requirement would not eliminate the element of surprise.* Search warrants are routinely issued *ex parte* by federal magistrates throughout the United States. Rule 41, Federal Rules of Criminal Procedure. *Ex parte* warrants could be issued and executed without prior notice to the employer. Thus this court observed in *See, supra,* at 545, and in *Almeida-Sanchez, supra,* at 283: "Nothing in the papers before us demonstrates that it would not be feasible for the border patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time." 413 U.S. at 283.

2. *The administrative burden of a warrant requirement would not justify abrogating constitutional rights to be free of unreasonable searches and seizures.* The government has made the administrative burdens argument in previous search cases only to have it emphatically rejected by this court. Thus, the Court in *Almeida-Sanchez* v. *United States* upheld the applicability of Fourth Amendment safeguards against claims of excessive burden on law enforcement in the immigration search context. It said:

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:
>
> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. *Brinegar* v. *United States,* 338 U.S. 160, 180, 69 S.Ct. 1302, 1313, 93 L.Ed. 1879 (Jackson, J., dissenting)." 413 U.S. at 273-274.

D. A Warrant Requirement Would Protect Important Constitutional Interests.

Appellants argue that a warrant requirement is unnecessary because of various safeguards in the Act which authorize inspections only upon presentation of appropriate credentials and "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner. 29 U.S.C. §657(a)(2) (1970)" (Appellants' Brief, pp. 24-31.)

However, the court has consistently ruled that "broad statutory safeguards are no substitute for individualized review . . ." and that the discretion thus left to the official in the field "is precisely the discretion which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Camara, supra,* at 532-533. See also to the same effect, *Almeida-Sanchez* v. *United States,* 413 U.S. at 273; and *United States* v. *United States District Court,* 407 U.S. 297 (1972), where the court decisively rejected the government's similar arguments supporting complete administrative discretion.

In *United States* v. *United States District Court,* even when the government's interest was preservation of domestic security, the court observed through Mr. Justice Powell:

> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government . . . Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. 407 U.S. at 317-18 (footnote omitted).

What constitutes "regular working hours," "reasonable times," "reasonable limits," and a "reasonable manner" is presently left to the discretion of the inspector. Therefore, even if the inspector erroneously concludes that a particular inspection would be "reasonable," the courts have unanimously held that the erroneous interpretation of the Act does not entitle the employer to dismissal of ensuing charges or to suppression of evidence gathered during the unreasonable inspection, absent a showing of "prejudice"

to his defense of the charges. E.g., *Hoffman Construction Co.* v. *OSHRC, et al.,* 546 F.2d 281 (9th Cir. 1974); *Hartwell Excavating Co.* v. *Dunlop,* 537 F.2d 1071 (9th Cir. 1976); *Chicago Bridge and Iron Co.* v. *OSHRC,* 535 F.2d 371 (7th Cir. 1976); *Accu-namics, Inc.* v. *OSHRC,* 515 F.2d 828 (5th Cir. 1975); *Secretary* v. *Western Waterproofing Co., Inc.,* OSHRC Docket No. 9739, 5 BNA OSHC 1496 (1977); *Secretary* v. *Bob's Tools & Supply Co., Inc.,* OSHRC Docket No. 13972, 4 BNA OSHC 1445 (1976).*

III. THIS COURT NEED NOT AND SHOULD NOT DECIDE THE APPROPRIATE STANDARD FOR ISSUANCE OF A WARRANT UNDER OSHA.

The court below did not construe OSHA to require a warrant, as urged in Point I of this Brief. Accordingly, it was not necessary for the court below to consider the appropriate standard for issuance of a warrant under OSHA, and it did not.

As this court expressly noted in *Camara, See* and *Almeida-Sanchez,* the precise standard of what constitutes "probable cause" to issue an administrative inspection warrant in a non-criminal context will depend upon factors that may vary from case to case. The factors noted in *Camara* included "the governmental interest which allegedly justifies official intrusion" (387 U.S. at 534), the "reasonable goals of code enforcement" (387 U.S. at 535) and an "appraisal of conditions in the area as a whole" (387 U.S. at 536). The appropriate standards, ruled *Camara,* "will vary with the . . . program being enforced, [and] may be based upon the passage of time, the nature

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* Appellants' assertion that area directors, not inspectors, decide which businesses to inspect (Br. 37) is irrelevant because area directors, like inspectors, are not the "disinterested" parties contemplated by *Camara.*

of the building . . . or the condition of the entire area . . ." 387 U.S. at 538.

In *See*, the court noted that "any constitutional challenge to [administrative inspection] programs can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of "reasonableness." 387 U.S. at 546. Similarly, in *Almeida-Sanchez*, the court cited *Camara* for the proposition that warrants could issue based upon "particular physical and demographic characteristics of the areas to be searched." 413 U.S. at 270.

One of the significant differences between OSHA inspections and traditional fire and safety inspections is that OSHA inspections by statute, can be triggered by complaints from employees. Thus, for example, a complaint by an employee might be one consideration in determining whether there were sufficient bases for issuance of an administrative inspection warrant.

Another significant difference between OSHA random inspections and other random inspections is that OSHA inspections are not based on "area" but on "accident experience and the number of employees exposed in particular industries." (Appellants' Brief, p. 9, n. 7). These considerations might be also appropriately taken into account in determining whether a search warrant were properly to be issued.

In short, appropriate standards for issuance of a warrant under OSHA may be significantly different from the standards for issuance of warrants under the quite different regulatory provisions at issue in *Camara* and *See*. Accordingly, it would be appropriate to defer judgment on this issue until the court below, or Congress, has had an opportunity to consider the issue.

CONCLUSION

This court should construe OSHA to require a warrant, for unconsented inspections of commercial premises or the applicable search provisions should be held to be unconstitutional.

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